Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1055

JOHN THOMAS ANDERSON, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR RESPONDENT IN OPPOSITION

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INTRODUCTORY STATEMENT

The opinion below, the asserted basis for this court's jurisdiction, the constitutional provisions involved, and the background of this case have been adequately set forth in the petition.

QUESTION FOR REVIEW

Whether the petitioner's right to a public trial was violated by the exclusion of his family and friends during jury selection, where the courtroom was large enough to seat only the prospective jurors, and where the petitioner failed to raise the public-trial issue until long after the verdict.

SUMMARY OF ARGUMENT

The petitioner's right to a public trial was not violated by the exclusion of his family and friends during jury selection, for the fact that the courtroom was large enough to seat only the prospective jurors rendered the exclusion reasonable, and, in any event, the petitioner clearly waived the point through his failure to raise it until long after the verdict.

ARGUMENT

THE PETITIONER'S RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED BY THE EXCLUSION OF HIS FAMILY AND FRIENDS DURING JURY SELECTION, FOR THE FACT THAT THE COURTROOM WAS LARGE ENOUGH TO SEAT ONLY THE PROSPECTIVE JURORS RENDERED THE EXCLUSION REASONABLE, AND, IN ANY EVENT, THE PETITIONER CLEARLY WAIVED THE POINT THROUGH HIS FAILURE TO RAISE IT UNTIL LONG AFTER THE VERDICT.

The petitioner argues that his constitutional right to a public trial was violated when his father, brother, and friends were denied access to the courtroom during jury selection because the courtroom was large enough to seat only the prospective jurors. The Colorado Supreme Court's opinion in this case, *Anderson v. People*, ... Colo. ....., 490 P.2d 47 (1971), rejected that argument, reasoning that the small size of the courtroom rendered the exclusion reasonable and that, in any event, the petitioner waived any objection he might have had by failing to raise the matter at the time. [While the petitioner relies on the principle that waiver of a constitutional right can-

not be presumed from a silent record, a reading of the cases he cites for that proposition reveals an intent to protect uncounseled criminal defendants. Once an attorney is present on a defendant's behalf, as was the case here, the same considerations obviously do not apply. See, *e.g.*, *United States v. DeMasi*, 445 F. 2d 251 (2d Cir. 1971), in regard to the analogous concept that a defendant's right to a speedy trial is deemed waived by his failure to make the proper demand.]

"Courts have been justifiably criticized where jury verdicts have been set aside by ingenious arguments . . . predicated upon constitutional rights not truly in issue." *Anderson v. People*, *supra* at ....., 490 P. 2d at 49. As the Colorado Supreme Court analyzed the situation,

> it is apparent in this case that the defendant's motion [raising the public-trial issue] arose as the result of a guilty [*sic*] verdict and not because of the denial of a constitutional right. Only after the defendant was found guilty did hindsight cause defense counsel to decide that the defendant was denied a public trial. During the selection of the jury, newsmen had continuous access to the courtroom, as did counsel and all others who requested the court grant them the right to be present. Defense counsel was, or should have been, aware of the limitations imposed by the size of the courtroom. No requests for a larger courtroom were made, however, and defense counsel did not complain of the denial of the defendant's right to a public trial until long after the jury reached its verdict.

Id. at ....., 490 P. 2d at 48-49.

CONCLUSION

The asserted constitutional issue is one manufactured by the petitioner. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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